holding that, assuming that jurisdiction did not attach by virtue of the question of the patent statute and viewing the matter as a mere contract action before the court by virtue of a diversity of citizenship, the contract was invalid under general law. This may be true, if we consider the contract as one of an extended series seeking to restrain trade. It should be noted that the Supreme Court has never dealt with a case in which a monopoly of production of the particular product was not involved. To permit the fixing of the resale price in such a case might be sanctioning the extension of the monopoly and it is this possibility that the court has endeavored to avoid.[15] If the Court did not place its decision on the ground that there was an unreasonable attempt to extend a monopoly, then logically it would have to hold that a contract fixing the resale price of a single chattel in which the public was not at all concerned would be invalid. Yet the pivotal case of *Dr. Miles' Medical Co.* v. *John D. Park & Sons Co.* expressly distinguished such a case.[16] It is probable that in dealing with instances of the restriction of resale prices that the Supreme Court has not intended to depart from "the rule of reason" enunciated in the Standard Oil and Tobacco Co. cases.[17] The inferences to the contrary may be explained by the fact that the Court has been very strict in its view of what is unreasonable when it has been confronted by an extended series of contracts as was the situation in every case which came before it.

"SUBSTANTIVE" RIGHTS IN CONFLICT OF LAWS.—The familiar doctrine that in the determination of a case involving a conflict of laws the *lex fori* will govern in matters of procedure, and the *lex loci* substantive rights, is now well settled and undisputed.[1] But the application of the rule is by no means free from difficulty. That the ordinary proceedings of a trial should be in accordance with the law of the forum is reasonable enough and any other rule would do little else than cause confusion and inconvenience. Similarly it is to be expected that the law of the place should control in determining whether or not the cause of action exists. But these cases are never questioned and indeed seem never to have arisen. But there is a middle ground in which the cases present questions of considerable perplexity. "Many laws are

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[15]It is difficult to see, however, why the monopoly of production of a particular article should be decisive of the question so long as the restraint is reasonable, especially when a monopoly in fact of the commodity does not exist. See the concurring opinion of Brandeis, *J.*, in Boston Store of Chicago *v.* American Graphaphone Co., *supra*; "Price Maintenance", 7 American Econ. Rev. 28; "The Cream of Wheat Case", 31 Pol. Sc. Quar. 392.

[16]"Nor are we dealing with a single transaction, conceivably unrelated to the public interest." At p. 407.

[17]Standard Oil Co. *v.* United States (1911) 221 U. S. 1, 31 Sup. Ct. 502; United States *v.* American Tobacco Co. (1911) 221 U. S. 106, 31 Sup. Ct. 632.

[1]Dicey, Conflict of Laws (2nd ed.) 708; Westlake, Private International Law (5th ed.) § 341.

only apparently rules of procedure, but in truth are material laws".[2] To state the proposition more accurately many laws are both procedural and substantive[3] and the problem is to determine which they shall be considered for the purposes of determining what law to apply. There are several very common instances. The Statute of Limitations is considered both in England and in this country as simply barring the remedy.[4] But clearly the right itself is affected. The distinction between the effect on the right and the remedy may be important as an historical explanation but it cannot be denied that by barring the remedy the statute has most effectively denied the right. Yet the Statute of Limitations has been considered in cases involving a conflict of laws as purely procedural, and consequently the courts have applied the *lex fori*.[5] With regard to presumptions, it is held that so-called conclusive presumptions, which are really not presumptions at all,[6] are rules of substantive law,[7] while true *prima facie* presumptions are procedural.[8] Perhaps the most striking illustration of the distinction between matters of procedure and substantive rights arises in the case of the Statute of Frauds. The courts distinguish between the 4th section which provides that "no action shall be brought" and the 17th section which provides that the contract "shall be void". In the former case, it is held that the effect of the statute is a matter of procedure,[9] while in the latter, the substantive right itself is barred.[10]

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[2]von Bar, International Law (Gillespie trans.) 497. "Very many rules are only in appearance rules of procedure and really concern the legal relation itself." von Savigny, Private International Law (Guthrie trans., 2nd ed.) 146-147.

[3]The explanation seems clearly historical. "whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source." Holmes, Common Law 253; "So great is the ascendancy of the law of action in the infancy of courts of justice, that substantive law has the look of being gradually secreted in the interstices of procedure, and the early lawyer can only see the law through the envelope of technical forms". Maine, Works 429.

[4]Higgins *v.* Scott (1831) 2 B. & Ad. 413; Michigan Ins. Bank *v.* Eldred (1889) 130 U. S. 693, 696; Currier *v.* Studley (1893) 159 Mass. 17, 25, 31 N. E. 709.

[5]*Per* Story, *J.*, Leroy *v.* Crowninshield (1820) 15 Fed. Cas. No. 8,269; British Linen Co. *v.* Drummond (1830) 10 B. & C. 903; Miller *v.* Brenham (1877) 68 N. Y. 83; Dicey, *op. cit.*, 709, 710; Westlake, *op. cit.*, § 238; Huber *v.* Steiner (1835) 2 Bing. (N. C.) 202.

[6]2 Chamberlayne, Evidence § 1087.

[7]Hartman *v.* Louisville & N. Ry. (1889) 39 Mo. App. 88; Valk *v.* Erie R. R. (1909) 130 App. Div. 446, 114 N. Y. Supp. 964; Waxelbaum *v.* Southern Ry. (1912) 168 Ill. App. 66; Koster *v.* Merritt (1864) 32 Conn. 246.

[8]Smith *v.* Wabash Ry. (1895) 141 Ind. 92, 40 N. E. 270; Pennsylvania Co. *v.* McCann (1896) 54 Oh. St. 10, 42 N. E. 768; Helton *v.* Alabama Ry. (1893) 92 Ala. 275, 12 So. 276; Jones *v.* Chicago R. R. (1900) 80 Minn. 488, 83 N. W. 446; Southern Ry. *v.* Robertson (1909) 7 Ga. App. 154, 66 S. E. 535.

[9]Leroux *v.* Brown (1852) 12 C. B. 801; Kleeman *v.* Collins (1872) 72 Ky. 460; Third Nat'l. Bank of N. Y. *v.* Steele (1902) 129 Mich. 434; 88 N. W. 1050.

[10]Marie *v.* Garrison (N. Y. 1883) 13 Abb. N. C. 210; *cf.* Westlake, *op. cit.*, § 208.

These illustrations serve to show the extent to which the courts have gone in their distinction. They seem to have applied as the test the classification of rights into substantive and procedural without realizing that the difference between the two is by no means an absolute one.[11] The terms procedure and substantive are words of art which serve a useful purpose in affording a convenient method of grouping. But the distinction is artificial and based on a difference of degree. It has been the view, however, that ample concessions were made to the *lex loci* since it could not be expected that in trying a case the forum should take over an entirely new procedure.[12] This seems a very narrow view. Since the distinction which has been made is not one necessary from the nature of things, it is submitted that the *lex loci* should be applied in those classes of cases where the result is so materially affected by the difference in the rule as to outweigh the inconvenience if any in departing from the procedural law of the forum. Where the rule of the *lex loci* is a familiar one there is greater reason for applying it.[13] The only limitation on the rule should be one of policy,[14] for the forum cannot be expected to apply rules of law, however important to the litigants, which are contrary to the spirit of its own laws.

This more liberal attitude seems to prevail on the continent[15] and it may be explained by their system of jurisprudence which considers law not as territorial but personal.[16] Whatever may be its explanation, it is to be hoped that the attitude may be adopted, and some recent decisions in this country are most encouraging. The recent case of *Barnet* v. *New York Central, etc. R. R.* (1918) 222 N. Y. 195, 18 N. E. 625, it was held in accordance with controlling authorities in the United States Supreme Court[17] that for the purposes of determining

[11]"The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself. * * * While it may be convenient to distinguish between the right or liability, and the remedy or penalty by which it is enforced, on the one hand, and the machinery by which the remedy is applied to the right, on the other, i. e., between substantive law and procedural law, it should not be forgotten that so far as either is law at all it is the litigant's right to insist upon it, i. e., it is part of his right. In other words, it is substantive law." Chamberlayne, *op. cit.*, § 171.

[12]Dicey, *op. cit.*, 709; Westlake, *op. cit.*, § 341.

[13]See 17 Columbia Law Rev. 633.

[14]Westlake, *op. cit.*, 296.

[15]von Savigny, *op. cit.*, 145; Lorenzen, Cases on Conflict of Laws, 84n.

[16]For an excellent discussion of some phases of this fundamental difference between the French and the Common Law, see Pillet, "Jurisdiction in Actions Between Foreigners." 18 Harvard Law Rev. 325.

[17]Central Vermont Ry. *v.* White (1915) 238 U. S. 507, 35 Sup. Ct. 865; Southern Ry. *v.* Prescott (1916) 240 U. S. 632, 36 Sup. Ct. 469. The former case arose under the Federal Employers' Liability Act. By the law of Vermont, the burden of proving freedom from contributory negligence was on the plaintiff, while in the federal courts, the burden of proving contributory negligence was on the defendant. Though the action was commenced in Vermont, the federal law governed all matters of substantive rights, and on appeal the United States Supreme Court held that the question of the burden of proof was of the very substance of the litigant's rights, and therefore it upheld the trial court in applying the federal law.

which party had the burden of proving contributory negligence with regard to an injury to an interstate freight shipment, that the burden of proof be considered a matter of substantive law.[18] In this case there was no evidence at all of contributory negligence, so that the determination of which party was under the burden of establishing it was of first importance to the decision. There seems little question that in the ordinary classification burden of proof is a matter of procedure. But it seems equally clear that in such a case as the court had before it, a substantial if not a substantive right was affected. Since, whoever has the burden of proof, the trial in the forum would not be inconvenienced, and since, clearly, no question of policy is involved, the Supreme Court rule seems indeed salutory, and it is to be hoped that even if the courts continue, in similar cases, to refer to "procedural" and "substantive" rights, they will not harass themselves with distinctions which have as their sole justification their convenience for other purposes.

THE EFFECT OF A CORPORATE MERGER UPON A CONTRACT OF SPECIAL GUARANTY.—Since originally, a contract of guaranty was usually entered into merely as an accommodation, and consequently resulted in no personal benefit to the guarantor, the law came to look upon a guarantor as a favorite and refused to subject him to liability except upon the strict terms of his undertaking. Consequently, when a contract of guaranty is entered into with a particularly named party, in the absence of some indication of an intention to make it assignable it will not be extended to any other party than the one named therein.[1] Accordingly it was held that a principal could not avail himself of a guaranty made with an agent, where the guaranty did not show that the agent was acting for an undisclosed principal.[2] Likewise, when a guaranty is given to a partnership, any change in the firm, will defeat the claim for any default subsequent to such change.[3] There

[18]This case, involving an injury to an interstate shipment, arose under the Carmack Amendment so that the federal substantive law controlled, though the action was brought in a state court. The rule of the federal courts was that for the purposes of conflict of laws, burden of proof was a matter of substance, *supra,* footnote 17, and the state court, bound by the federal rule, applied the federal rule that the burden of proof was on the shipper.

[1]Lamm & Co. *v.* Colcord (1908) 22 Okla. 493, 98 Pac. 355; Lyon & Co. *v.* Plum (1908) 75 N. J. L. 883, 69 Atl. 209; 1 Brandt, Suretyship (3rd ed.) § 106; Stearns, Suretyship (2nd ed.) § 2; see 17 Columbia Law Rev. 561.

[2]Barns *v.* Barrow (1874) 61 N. Y. 39; see Nat'l Bank of Peoria *v.* Diefendorf (1878) 90 Ill. 396.

[3]Strange *v.* Lee (1803) 3 East 484; Spiers *v.* Houston (1829) 4 Bligh (N. S.) 515; Bennett *v.* Draper (1893) 139 N. Y. 266, 34 N. E. 791; Chapman *v.* Beckinton (1842) 3 Q. B. 703; 2 Bates, Partnership, § 649. However, a guaranty given to a corporation can be enforced by a receiver, Philadelphia *etc.* Co. *v.* Daube (C. C. 1896) 71 Fed. 583, since the effect of the appointment of a receiver is to transfer the custody of the assets and rights of the corporation into the hands of the court and does not accomplish a change of title. Chicago Union Bank *v.* Kansas City Bank (1890) 136 U. S. 223, 236, 10 Sup. Ct. 1013.